No. 89-671

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff,

vs.

HARTFORD INSURANCE COMPANY OF ILLINOIS, et al.,
Defendants.

THE AMERICAN INSURANCE COMPANY,
Third-Party Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA,
Third-Party Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CRAIG A. CHAPELLO *
PRETZEL & STOUFFER, CHARTERED
One South Wacker Drive
Chicago, Illinois 60606
(312) 346-1973

Attorneys for Petitioner
THE AMERICAN INSURANCE COMPANY

Of Counsel:

ROBERT MARC CHEMERS
RICHARD S. WISNER
CHARLES F. REDDEN
MICHAEL G. BRUTON

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the special venue provision contained in the National Bank Act, 12 U.S.C. § 94 (1982), which requires that actions against a bank for which the Federal Deposit Insurance Corporation (FDIC) has been named a receiver or actions against the FDIC as receiver of such a bank, also applies to limit the venue for actions, brought under the Federal Tort Claims Act (FTCA), against the United States of America, when the FTCA action arises out of the allegedly tortious conduct of the FDIC.

II. Whether, despite the well-recognized doctrine of ancillary venue, a third-party defendant can use the special venue provision contained in the National Bank Act, 12 U.S.C. § 94, to force a third-party plaintiff to assert its third-party claim in separate litigation in another forum, thereby depriving the third-party plaintiff of its right to assert an action pursuant to Rule 14 of the Federal Rules of Civil Procedure.[1]

[1] In accordance with Rule 21(b) of the United States Supreme Court all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit appear in the caption of this case.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

District Court: The opinion of the United States District Court for the Northern District of Illinois denying the United States' Motion to Dismiss has been reported

at *Federal Deposit Insurance Corporation v. Hartford Insurance Company of Illinois*, 692 F. Supp. 866 (N.D. Ill. 1988). A copy of that opinion is included in the Appendix as Exhibit A.

Court of Appeals: The opinion from the United States Court of Appeals for the Seventh Circuit in which the majority reversed the District Court's decision has been reported at *Federal Deposit Insurance Corporation v. Hartford Insurance Company of Illinois*, 877 F.2d 590 (7th Cir. 1989). A copy of the opinion is included in the Appendix as Exhibit B.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1). The Court of Appeals rendered its opinion on June 15, 1989 and denied a Petition for Rehearing with Suggestion for Rehearing *En Banc* on July 25, 1989. This Petition for Certiorari has been timely filed in accordance with Supreme Court Rule 20 and 28 U.S.C. § 2101(c). A copy of the Order denying the Petition for Rehearing with Suggestion for Rehearing *En Banc* is included in the Appendix as Exhibit C.

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1292(b). The Seventh Circuit also concluded that it had subject matter jurisdiction either under 28 U.S.C. § 1346(b) or 12 U.S.C. § 1819 Fourth and 28 U.S.C. § 1331. 877 F.2d at 592.

The District Court had jurisdiction over the original action filed by the FDIC pursuant to 28 U.S.C. § 1345

and 12 U.S.C. § 1819 Fourth. It had jurisdiction over the third-party action pursuant to 28 U.S.C. § 1346(b) because it is an action against the United States for money damages for loss of property caused by the negligent or wrongful act or omission of an employee of the FDIC, a federal agency.[2]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

12 U.S.C. § 94 provides that:

> Any action or proceeding against a national association for which the Federal Deposit Insurance Corporation has been appointed receiver, or against the Federal Deposit Insurance Corporation as receiver of such association, shall be brought in the district or territorial court of the United States held within the district in which that association's principal place of business is located, or, in the event any State, county or municipal court has jurisdiction over such

[2] Originally, in the District Court, the United States argued that the Court did not have subject matter jurisdiction over the case because the FDIC, acting as a receiver for a bank, was not a federal agency. The District Court correctly concluded that the allegations against the FDIC were allegations against a federal agency and, therefore, that it did have jurisdiction over the subject matter of the third-party action. On appeal in the Seventh Circuit, the United States chose not to pursue the jurisdictional issue. Despite repeated attempts by the Court, during oral arguments the United States refused to address the subject matter jurisdiction issue. The Seventh Circuit decided that it had subject matter jurisdiction either under 28 U.S.C. § 1346(b), if the United States is the proper party or, 12 U.S.C. § 1891 Fourth, if the FDIC as receiver is the proper party. *Federal Deposit Insurance Corporation v. Hartford Insurance Company*, 877 F.2d 590, 592 (7th Cir. 1989).

an action in which that association's principal place of business is located.

Rule 14(a) of the Federal Rules of Civil Procedure provides in part that:

> At any time after the commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plainitiff's claim against him.

STATEMENT OF THE CASE

On October 6, 1987, the FDIC, acting in its corporate capacity, filed suit against several insurance companies, including The American Insurance Company (American), seeking to establish that there is insurance coverage under certain Bankers Blanket Bonds for losses sustained by Continental Illinois National Bank (Continental).[3] The FDIC alleged that losses on certain loans in which Continental Bank had a participating interest were sustained as a result of dishonest or fraudulent conduct by one of Continental's employees.[4] The loans at issue were made

[3] On August 23, 1984, Continental Illinois National Bank assigned all right, title and interest in its claims arising out of certain fidelity bonds to the FDIC.

[4] American strongly objects to the Court of Appeals' recitation and characterization of the facts of this case. The Court relied on references which are beyond the scope of the record in this case. The Court's characterizations of Mr. Lytle's dealings with Penn Square as "Hanky-Panky" and inspired by $585,000 in personal loans, 877 F.2d at 590, are unsupported by the record in this case. In *United States v. Lytle*, 677 F. Supp. 1370 (N.D. Ill. 1988), al-

(Footnote continued on following page)

by the Penn Square Bank in Oklahoma City, Oklahoma (Penn Square).

In July 1982, the Office of the Controller of the Currency took control over Penn Square, and appointed the FDIC receiver of the remaining assets of the bank. As receiver of the assets, the FDIC undertook responsibility for administering the loans in which Continental had a participating share. American has alleged that the FDIC tortiously mismanaged the loans which made it impossible to recover on many of those loans and, therefore, Continental as a participating bank suffered losses on those loans.

American filed a Third-Party Complaint against the United States alleging that negligent acts or omissions by the FDIC, a federal agency, resulted in some or all of the losses sustained by Continental. Significantly, American's third-party action did not allege that Penn Square prior to its insolvency had negligently approved or administered the loans. Rather, American has alleged that the negligent conduct of the FDIC after it took control of the loans was the proximate cause of some of the losses on the loans.[5]

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[4] *continued*
though the District Court set forth in detail the indictment against Mr. Lytle it did not reach any factual conclusions about the validity of the charges. Although Mr. Lytle pled guilty to one count charging misapplication of bank funds involving a single transaction, all other charges and factual allegations were stricken from the indictment.

[5] American alleges that after the Federal Deposit Insurance Corporation took control of Penn Square Bank's (Penn Square) assets, including the loans in which Continental had a participation, the FDIC disregarded its duties when it committed one or more of the following acts or omissions:

(Footnote continued on following page)

District Court

The United States moved to dismiss the Third-Party Complaint, initially arguing that the District Court lacked subject matter jurisdiction. It later amended its motion to include a challenge to venue in the Northern District of Illinois. In its subject matter jurisdiction argument, in the District Court, the United States took the position that the FDIC, acting in its capacity as a receiver of a failed bank, is not a federal agency. The District Court held that the FDIC acting in its capacity as a receiver is a federal agency and, therefore, the District Court had subject matter jurisdiction over the Third-Party Complaint. 692 F. Supp. at 870. Without discussion, the District Court concluded that the venue provision in the National Banking Act, 12 U.S.C. § 94, applied to the type of action asserted by American. *Id.* However, the District Court held that the widely accepted doctrine of ancillary venue over a third-party action made it unnecessary for

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[5] *continued*

a. Cancelled Penn Square letters of credit enabling debtors to avoid all liability on loans;

b. Ignored accounts as a result of understaffing or insufficiently trained staff;

c. Demanded immediate and full payment on loans, forcing debtors into bankruptcy;

d. Failed and refused to cooperate with CONTINENTAL in their actual and offered efforts to collect on loans;

e. Engaged in collection or recovery tactics that sacrifice the greatest possible return for the quick return or, at least a 100% return on the Penn Square portion, to the detriment of CONTINENTAL, and

f. Committed or failed to do these acts described in (a) through (e) above with respect to other banks' participations involving common borrowers to CONTINENTAL, all to the detriment of CONTINENTAL.

the Court to dismiss or transfer the Third-Party Complaint. 692 F. Supp. at 871. The District Court certified its Order under 28 U.S.C. § 1292(b). *Id.*

Court of Appeals

The Seventh Circuit granted the United States' Application For Leave to Appeal. On appeal, the United States decided not to argue that the FDIC acting in its capacity as a receiver was not a federal agency. Moreover, recognizing that the Third-Party Complaint was brought pursuant to the FTCA, and that the United States is the proper party under the FTCA, the United States has never argued that the proper party should be the FDIC. The majority of the panel on appeal (Posner, J. and Easterbrook, J.), noted that if the suit is against the United States rather than the FDIC, Section 94, seems to be inapplicable. 877 F.2d at 591. However, the majority concluded that unless Section 94 applied to FTCA actions against the United States arising out of conduct of the FDIC acting as receiver, the 1982 amendment to Section 94 would be "stillborn". 877 F.2d at 593. The Court of Appeals expanded the application of Section 94 beyond the narrow scope intended by Congress. In addition, the majority refused to apply the doctrine of ancillary venue. 877 F.2d at 593-94.

Judge Ripple, writing separately, concluded that because the United States decided not to argue that the FDIC should be the proper party, the Court should never have granted this interlocutory appeal to consider the question of venue. 877 F.2d at 594. Judge Ripple did not explicitly indicate whether he agrees or disagrees with the majority's expansion of Section 94 or the majority's disregard for the doctrine of ancillary venue. It can be inferred, however, that Judge Ripple concluded that the interlocu-

tory appeal was improperly granted because Section 94 by its terms does not apply to a FTCA action against the United States and the United States has never argued that the third-party action in this case is not a FTCA action or that it is not the proper party.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO DECIDE WHETHER THE SPECIAL VENUE PROVISION CONTAINED IN THE NATIONAL BANK ACT APPLIES TO FTCA CASES AGAINST THE UNITED STATES ARISING OUT OF THE CONDUCT OF THE FDIC, BECAUSE IT IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, ADDRESSED BY THIS COURT.

One need only read the newspaper or watch the evening news to realize that recently, there has been a rash of bank failures and that there is an increasing number of "problem" banks. In many of these cases, the FDIC becomes receiver of the bank's remaining assets. Those same newspapers and broadcasts also report allegations of negligence and mismanagement by the FDIC after it has taken control of the troubled banks. The Third-Party Complaint in this case alleges that after taking over the assets of Penn Square, the FDIC tortiously mismanaged the loans in which Continental had a participation. The Third-Party Complaint also alleges that this conduct by the FDIC caused, or at least contributed to, the losses for which the FDIC now seeks to recover from American.

This case of first impression presents a significant federal question which should be decided by this Court because the Court of Appeals' decision will have an impact on all cases alleging that the FDIC negligently handled or mismanaged the remaining assets of a failed bank. The Court of Appeals' decision in this case limits the venue for all FTCA cases, including third-party actions, brought against the United States which are based upon tortious conduct of the FDIC which occurs while acting as a receiver for a bank. Congress has recognized that Section 94 imposes a substantial burden on litigants. *See* S. Rep. No. 97-536, 97th Cong., 2d Sess. 28, *reprinted in*, 1982 U.S. Code Cong. & Ad. News 3054-3082. In light of the increasing number of failed and problem banks, the increased role of the FDIC in acting as a receiver for these banks and the substantial burden Section 94 imposes on parties, this Court should grant the Petition for Certiorari to consider whether Section 94 must be expanded to include FTCA cases.

Originally incorporated into the Act to Provide A National Currency in 1863, Section 94 required that all actions against national banks or the FDIC as the receiver for a national bank be brought in the district where the bank had its principal place of business.[6] This Court has noted that the original purpose for the narrow venue pro-

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[6] Perhaps because of the significant burden on a party's ability to assert a claim, this Court has reviewed the scope of Section 94 on several prior occasions, including: *Citizens & Southern National Bank v. Bougas*, 434 U.S. 36 (1977); *Chase Manhattan Bank v. Sailboat Apartment Corp.*, 429 U.S. 911 (1976); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976); *National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc.*, 425 U.S. 460 (1976); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963); *Charlotte National Bank v. Morgan*, 132 U.S. 141 (1889).

vision was convenience to banking institutions and to prevent any interruption in business which might occur from having the bank's books sent to distant counties. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 156 (1976). Recognizing that modern technology had substantially reduced the need for the special venue provision, in 1982, Congress amended Section 94, limiting its application to actions against banks for which the FDIC has been appointed receiver or "against the FDIC as receiver of such association." 12 U.S.C. § 94. In its report on that amendment, the Senate specifically noted that: "The likelihood of disruption to a bank is now no greater than to any other corporation, while the burden imposed on plaintiffs by the special venue law may be substantial." S. Rep. No. 97-536, 97th Cong., 2d Sess. 28, *reprinted in*, 1982 U.S. Code Cong. & Ad. News 3054, 3082. Section 94 is now designed to protect the remaining assets of a failed or "problem" bank by requiring all actions seeking to recover from those assets to be filed in the bank's home jurisdiction.

Despite the fact that, due to its substantial burden on litigants, Congress in 1982 limited the special venue provision, in this case, the Court of Appeals enormously expanded the application of Section 94. It is clear that Section 94 applies only to those cases in which a plaintiff's cause of action is based upon some conduct by the bank prior to the time the FDIC was named as a receiver. In those cases, the plaintiff seeks to recover from the remaining assets of the bank and is required to name the FDIC as the receiver of those assets. In this case, however, the Court of Appeals expanded its application to also include cases in which the United States is the named defendant because the cause of action arises not out of the conduct of the bank but out of the allegedly tortious

conduct of the FDIC. 877 F.2d at 593.[7] The Court of Appeals' erroneous decision is based upon its failure to recognize the important distinction between cases naming the FDIC in its capacity as receiver of a failed bank and cases against the United States arising out of the tortious conduct of the FDIC.

This unwarranted judicial expansion of Section 94 will have a significant impact on a large number of cases. For example, based upon the Court of Appeals' holding, if an FDIC employee, who was acting within the scope of his

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[7] Under the existing precedent in the Seventh Circuit, the United States is the proper party in this case. The Court of Appeals noted that implicit in its holding in *Federal Deposit Insurance Corporation v. Citizens Bank & Trust Co.*, 592 F.2d 364 (7th Cir. 1979), *cert. denied*, 444 U.S. 829 (1979), was the conclusion that the FDIC, acting as a receiver, is a federal agency within the meaning of the FTCA. *See, FDIC v. Hartford*, 877 F.2d at 592. In *Citizens Bank & Trust*, the Seventh Circuit held that despite the "sue and be sued" provision of 12 U.S.C. § 1819 Fourth, the United States had only waived its immunity as to those claims cognizable under the FTCA. Claims under the FTCA must be brought against the United States not the federal agency. *See*, 28 U.S.C. §2679(a); *Gregory v. Mitchell*, 634 F.2d 199, 203-04 (5th Cir. 1981).

Subsequent to this Court's decision in *Franchise Tax Board of California v. USPS*, 467 U.S. 512 (1984), the Ninth Circuit has held that the "sue and be sued" provision contained in 12 U.S.C. § 1819 Fourth is a waiver of immunity broader than the waiver contained in the FTCA. *Woodbridge Plaza v. Bank of Irvine*, 815 F.2d 538, 544 (9th Cir. 1987). Under this analysis, the FDIC itself might be the proper party, however, even if the FDIC is the proper defendant, Section 94 would not apply because the third-party action seeks to impose liability on the FDIC for its own conduct, not as receiver of the Penn Square Bank. Moreover, even if the FDIC is the proper party, because of the legal fiction that the FDIC acts as two separate entities, the FDIC Corporate and the FDIC Receiver, American would still be required to file a third-party action not a cross-claim. *See FDIC v. Hartford*, 692 F. Supp. at 868. The original action was filed by FDIC Corporate. The third-party action would be against FDIC Receiver.

employment as a receiver for Penn Square, was involved in an automobile accident in Chicago, an injured plaintiff would be required to travel to Oklahoma City, Oklahoma to file suit. While the allegedly tortious conduct of the FDIC which forms the basis for the third-party action in this case is more closely related to the affairs of the bank than the conduct involved in driving the car, they share one essential element. In both the hypothetical automobile accident case and this case, the claim arises out of tortious conduct of the FDIC. Both of those cases are very different from the case which names the FDIC as a party, not because of any tortious conduct by the FDIC, but solely because the FDIC, as receiver, has control over the remaining assets of the bank.

In concluding that Section 94 applies to FTCA cases, the Court of Appeals refused to recognize the important distinctions between the case which seeks to recover from the remaining assets of the bank and the case which seeks to impose liability on the United States for the tortious conduct of one of its agencies. Contrary to the Court of Appeals' conclusion, American's argument would not "leave the 1982 version of Section 94 stillborn." 877 F.2d at 590. Section 94 would still apply to all cases which sought to recover from the remaining assets of the bank for some contract, tort or other conduct of the bank prior to the time it was taken over by the FDIC.[8]

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[8] For examples of the types of cases to which Section 94 would continue to apply, even under American's analysis, *See*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 149 (1976) (action against bank for alleged violations of Securities Exchange Act of 1934); *Mercantile Nat'l. Bank v. Langdeau*, 371 U.S. 555, 556 (1963) (action against two national banks alleging conspiracy to defraud insurance company); *Buffum v. Chase Nat'l Bank of City of New York*, 192 F.2d 58, 59 (7th Cir. 1951), *cert. denied*, 342

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The Court of Appeals' analysis also completely disregards several well-recognized rules of statutory construction. The language of Section 94 is clear. It does not apply to actions against the United States. It only applies to actions against banks for which the FDIC has been named as the receiver and actions against the FDIC as receiver of those banks. The Court should have ended its inquiry with the clear unambiguous language of the statute. *Burlington Northern Railroad v. Oklahoma Tax Commission*, 481 U.S. 454 (1987). Another general rule of statutory construction provides that where a statute names parties who come within its provisions, other unnamed parties are presumed to be excluded. *Foxgord v. Hischemoeller*, 820 F.2d

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[8] *continued*

U.S. 944 (1952) (action against national bank for wrongful refusal to consummate sale); *International Travelers Cheque Co. v. Bank America Corp.*, 660 F.2d 215, 216 (7th Cir. 1981) (action against national bank seeking to prevent patent of term "International Travelers Cheque"); *Fisher v. First Nat'l Bank of Chicago*, 538 F.2d 1284, 1285 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) (class action against national bank alleging usurious interest charged on credit cards); *Froning Deppe, Inc. v. Continental Illinois National Bank & Trust Co.*, 695 F.2d 289, 290 (7th Cir. 1982) (action against national bank for allegedly forged and unauthorized endorsement of checks); *Petrizzo v. United States*, 492 F. Supp. 752, 753 (D. N.J. 1980) (action against bank for depositor's unpaid taxes); *In re Continental Securities Litigation*, No. 82-C-4712, Slip Op. at 1 (N.D. Ill. Oct. 21, 1985) (action against FDIC as receiver of national bank alleging breach of employment contract with bank and seeking indemnification and contribution for any liability based upon fraudulent misrepresentations made by officers and employees of bank); *Nat'l Union Fire Ins. Co. v. Continental Illinois Corp.*, 640 F. Supp. 182, 183 (N.D. Ill. 1986) (action against FDIC solely in capacity as receiver seeking to avoid liability under insurance policies issued to bank); *Apco Employees Credit Union v. Sun Capital Management*, No. 83-P-2760-S (N.D. Ala. Jan. 4, 1984) (action against bank and FDIC as receiver for contribution based upon potential liability of third-party plaintiff for recommending purchase of certificates of deposit at bank).

1030, 1035 (9th Cir.), *cert. denied*, ____ U.S. ____, 108 S. Ct. 503 (1987). In Section 94, Congress did not refer to FTCA actions against the United States for conduct by the FDIC arising out of its duties as a receiver. This exclusion is even more significant when coupled with the fact Congress was presumably aware that the United States is the proper party to such actions.[9]

Even if Section 94 was considered ambiguous, the Court of Appeals' interpretation is contrary to the intent of Congress as reflected in the legislative history. In 1982, when Congress amended Section 94, it narrowed its application. The legislative history does not directly address the issue in this case, however, it is clear that Congress believed the advancements of modern technology substantially reduced the burden on the banks caused by litigation in foreign jurisdictions. It is also clear that Congress believed that the substantial burden Section 94 imposed on parties pursuing claims against national banks was no longer warranted. Congress did allow one narrow category of cases to remain under the protection of Section 94. The special venue provision continues to apply to those cases seeking to recover from the assets of a bank which due to financial dificulties was in receivership. In those cases, protecting the remaining assets of the bank justified the burden imposed on the party seeking to pursue a claim against the bank. In this case, the third-party claim does not seek to impose liability on the bank. In fact, it is not at all clear that the assets of the bank will be effected. The Justice Department, under the direction of the Attorney General of the United States, must represent the United States *See* 28 U.S.C. § 516. At oral argument in

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[9] See note 7, *supra*.

the Court of Appeals the attorney for the United States admitted that he was not sure of the source of funds to pay any judgment. It is very hard to believe that a judgment against the United States based upon the negligent conduct of the FDIC would be paid out of the remaining funds of the bank.[10]

The Court of Appeals' interpretation of Section 94 is not consistent with the original purpose for the venue provision or the legislative history surrounding the amendment of the provision. In fact, the Court of Appeals interpretation of Section 94 renders the statute unconstitutional. It imposes a more significant burden on parties pursuing a FTCA claim against the United States for conduct by the FDIC than parties pursuing a FTCA claim against the United States based on the conduct of any other federal agency, without any rational basis for imposing this additional burden. The Seventh Circuit's interpretation of Section 94 deprives American of its constitutional right to equal protection.

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[10] Because the United States seeks to expand the application of Section 94, it should have the burden to establish that the FTCA action will have an impact on the remaining assets of the bank. Any award, compromise or settlement of a claim or action under the FTCA in an amount less than $2,500 is paid by the head of the federal agency involved in the action, out of funds appropriated to that agency. Congress has also provided appropriations to pay FTCA claims in excess of $2,500 with the approval of the Attorney General. *See* 28 U.S.C. §§ 2672, 2677; 31 U.S.C. §§ 1304.

II.

THE COURT SHOULD GRANT THIS PETITION FOR CERTIORARI TO DECIDE WHETHER, DESPITE THE WELL-RECOGNIZED DOCTRINE OF ANCILLARY VENUE, THE THIRD-PARTY DEFENDANT CAN USE SECTION 94 TO FORCE A THIRD-PARTY PLAINTIFF TO ASSERT ITS CLAIMS IN A SEPARATE ACTION IN ANOTHER FORUM BECAUSE IT IS A SIGNIFICANT FEDERAL QUESTION AND THERE IS A CONFLICT AMONG THE COURTS WHICH HAVE CONSIDERED IT.

This case presents not only the important federal question of whether Section 94 applies to FTCA actions against the United States arising out of the conduct of the FDIC, but also whether a third-party defendant should be allowed to use that venue provision to deprive a third-party plaintiff of its right to assert a third-party claim in the pending action. As previously noted, this Court and Congress have recognized the substantial burden Section 94 imposes on parties. The Court of Appeals not only concluded that imposition of this substantial burden is warranted in the type of action asserted against the United States in this case, the Court also allowed the United States to impose that burden on American despite the fact that American did not choose the forum for the original action. This Court should grant the Petition in order to address the significant federal question of whether Section 94 supersedes the right to assert third-party actions provided by Rule 14(a) of the Federal Rules of Civil Procedure and to resolve the conflict among the courts which have considered this significant issue.

The doctrine of ancillary venue is well-recognized. As a general rule, a third-party defendant cannot object to the venue of the third-party action because the defendant did not choose the venue for the primary action. *Pelinski v. Goodyear Tire & Rubber Company*, 499 F. Supp. 1092,

1095 (N.D. Ill. 1980); *First Federal Savings & Loan Association v. Oppenheim, Appel, Dixon & Co.*, 643 F. Supp. 1341, 1349 (S.D.N.Y. 1986); C. Wright & A. Miller, *Federal Practice and Procedure*, § 1445 at 240-41 (1971); 3 J. Moore, *Federal Practice*, par. 14.28[2] at 14-124 to 125 (2d ed. 1988). The doctrine of ancillary venue protects the defendant's rights pursuant to Rule 14(a) of the Federal Rules of Civil Procedure to file a complaint against any party who is or may be liable to him for all or part of the plaintiff's claim against him. Without the doctrine of ancillary venue, in many cases, the cost of duplicative litigation would effectively preclude a party from filing the complaint allowed by Rule 14, thus rendering the right meaningless. The District Court relied on this doctrine in denying the United States' Motion to Dismiss. 692 F. Supp. at 871. The majority of the Court of Appeals chose to ignore this important doctrine and considered the Third-Party Defendant's challenge to venue. 877 F. 2d 593-94. Although arguing that Section 94 should apply to the Third-Party Complaint in this case, when it has been more convenient, the United States has not hesitated to argue that Section 94 does not apply to third-party claims. *See Petrizzo v. United States*, 492 F. Supp. 752, 754 (D. N.J. 1980).

There is a conflict among those courts which have considered whether Section 94 should be applied to third-party actions. In *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1527 n.10 (9th Cir. 1985), the Ninth Circuit noted that Section 94 should apply to a third-party action by a plaintiff because the plaintiff originally had a choice of forums. In *Haile v. Henderson National Bank*, 657 F.2d 816, 822 n.6 (6th Cir. 1981), the Sixth Circuit noted that Section 94 would not require dismissal of the third-party claim because the court had ancillary venue over the

claim. Several Courts have held that the interests protected by Section 94 do not require a departure from the well-recognized concept of ancillary venue. *G.O.M.B., Inc. v. C.A.M. Production & Development Co.*, Civ. Action No. 87-1088, Lexis No. 11724 (D. Kan. 1987); *Herndon v. Herndon*, 491 F. Supp. 53, 55 (W.D. Tex. 1980); *Jones v. Kreminski*, 404 F. Supp. 667, 669 (D. Conn. 1975), *appeals dismissed*, 603 F.2d 213 (2d Cir. 1979), *remanded*, 614 F.2d 1287 (2d Cir. 1979); *Odette v. Shearson, Hamil & Co.*, 394 F. Supp. 946, 952 (S.D.N.Y. 1975); *Flagship National Bank of Miami v. Commercial Bank & Trust*, 428 So. 2d 361, 362 (Fla. Dist. Ct. App. 1983); *Petrizzo v. United States*, 492 F. Supp. 752, 754 (D. N.J. 1980).

In the following cases, Section 94 was applied to third-party actions: *In re Continental Securities Litigation*, No. 82 C 4712 Slip Op. at 3 (N.D. Ill. Oct. 21, 1985); *Apco Employees Credit Union v. Sun Capital Management*, No. C.V. 83-P-2760-S (N.D. Ala. Jan. 4, 1984); *Southeast Guaranty Trust Co., Ltd. v. Rodman & Renshaw, Inc.*, 358 F. Supp. 1001, 1005 (N.D. Ill. 1973); *Swiss Israel Trade Bank v. Mobley*, 319 F. Supp. 374, 375 (S.D. Ga. 1970).

In this case, the Court's reasons for applying Section 94 to the third-party action are flawed in two respects. Initially, the Court erroneously concluded that discovery costs will not be duplicative. The majority simply reasoned that the burden on American and the court system will not be great because once one party discovers a fact in one jurisdiction, it will not be required to discover the fact in the other jurisdiction. 877 F.2d at 593. This argument might have some merit if the parties were identical in both actions and represented by the same lawyers in both actions. In fact, the primary action in Illinois involves the FDIC in its corporate capacity which is distinct from

the FDIC in its capacity as receiver. *See FDIC v. Hartford*, 692 F. Supp. at 868; *FDIC v. Citizens Bank & Trust Co.*, 592 F.2d 364 (7th Cir. 1979). Therefore, regardless of whether the action in Oklahoma names the United States or the FDIC as receiver, the same parties will not be present in both cases. Moreover, if the United States is the proper defendant in Oklahoma, it will be represented by the Justice Department, not the attorneys currently representing the FDIC in its corporate capacity. It is far from clear that American will incur the additional expenses associated with having a Chicago law firm pursue its claims in Oklahoma or that the FDIC as a receiver would retain the same law firm in the action against it in Oklahoma that the FDIC in its corporate capacity is utilizing in Illinois. The conclusion that duplicative discovery will be unnecessary does not consider the practicalities of litigation in this case.

Moreover, contrary to the majority opinion, there is substantial overlap between the primary action and the third-party action. The same loans and the reasons for losses on those loans are at issue in both actions. In the original action American has raised as an affirmative defense that the losses for which the FDIC seeks to recover were based in part on the mismanagement of the loans by the FDIC. Whether the FDIC's alleged mismanagement resulted in losses to Continental on the loans for which the FDIC now seeks insurance coverage will also be the primary issue in the third-party action. This substantial overlap is essential to actions brought under Rule 14(a) because the action must be based upon allegations that the third-party defendant is liable to the third-party plaintiff for some or all of the plaintiff's claim against the third-party plaintiff.

Furthermore, the majority erroneously concluded that, as a matter of law, it was not necessary to consider the burden on American. The majority focused on the third-party defendant's convenience. While the majority's observation is true in the context of a primary action, when the issue of venue arises in a third-party action, the burden on the third-party plaintiff must also be considered because it did not choose to initiate the primary case in this venue. The majority opinion did not even consider the substantial burden on American.

By carefully choosing the forum in which the FDIC in its corporate capacity pursues a claim against a potential creditor of the failed bank, it can, for all practical purposes, foreclose that creditor from naming the FDIC in its capacity as a receiver in a third-party claim. Fundamental fairness dictates that the burden imposed on American must be given substantial consideration when the venue of the third-party action is challenged. When the burden on the United States in defending the Third-Party Action in Illinois is weighed against the substantial burden imposed on American of prosecuting its claim against the United States in Oklahoma while defending the action brought by the FDIC in Illinois, it is clear that Section 94 should not be applied to American's third-party action.

CONCLUSION

For the reasons stated and upon the authorities cited, The American Insurance Company respectfully requests that this Court grant its Petition for Writ of Certiorari in this case. The questions presented for review raise important federal issues which have not been, but should be, decided by this Court and have created a conflict among those courts which have addressed the issues.

Respectfully submitted,

CRAIG A. CHAPELLO *
PRETZEL & STOUFFER, CHARTERED
One South Wacker Drive
Chicago, Illinois 60606
(312) 346-1973

Attorneys for Petitioner
THE AMERICAN INSURANCE COMPANY

Of Counsel:

ROBERT MARC CHEMERS
RICHARD S. WISNER
CHARLES F. REDDEN
MICHAEL G. BRUTON

* Counsel of Record

APPENDIX

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EXHIBIT A

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff,

v.

HARTFORD INSURANCE COMPANY OF ILLINOIS, Insurance Company of North America, the American Insurance Company, the Aetna Casualty and Surety Company, and Reliance Insurance Company, Defendants.

The AMERICAN INSURANCE COMPANY, Third-Party Plaintiff,

v.

UNITED STATES of America, Third-Party Defendant.

No. 87 C 8682.

United States District Court,
N.D. Illinois, E.D.

July 27, 1988.

* * * * *

ORDER

NORGLE, District Judge.

The United States of America has moved to dismiss American Insurance Company's ("American") third-party complaint. The United States argues that the third-party complaint is not subject to the court's jurisdiction and it fails to state a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(1), 12(b)(6). For the following reasons, the motion is denied.

FACTS

On August 23, 1984, Continental Illinois National Bank and Trust Company of Chicago ("Continental") assigned to the Federal Deposit Insurance Corporation ("FDIC"), in its corporate capacity, the claims arising from its fidelity bond coverage with defendant insurance companies. The FDIC, in its corporate capacity, brings this action seeking recovery in Count I against the insurance companies for failure to settle Continental's claims arising under the bonds for losses sustained due to the dishonest and/or fraudulent acts of Continental employee(s). In Count II, the FDIC alleges American provided financial assistance to the indicted Continental employee whose acts form the basis of the FDIC's claim for bond coverage.

American filed this third-party complaint against the United States alleging jurisdiction under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.* American alleges that on July 5, 1982, the FDIC was appointed receiver of the Penn Square Bank, a national bank, whose assets and liabilities included loans under which Continental was the participating bank and which now constitute the losses claimed against American in the underlying complaint. American alleges that the Receiver-FDIC tortiously mismanaged the assets and liabilities of Penn Square. Those assets and liabilities remained with the Receiver-FDIC until July 28, 1983 when they were transferred to Continental.

American asserts this third-party claim against the United States, alleging the Receiver-FDIC was acting as an agent of the United States. The third-party claim sounds in recoupment against the United States for that portion of American's liability in damages attributable to the Receiver-FDIC's contributory fault.

DISCUSSION

The issue before this court is whether American has sued the proper party in its third-party complaint. It is well-established that the United States is immune from

money damages suits except where it has statutorily consented to be sued. *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976); *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed.2d 1058 (1941); *Ogden v. United States*, 758 F.2d 1168, 1177 (7th Cir.1985); *Clark v. United States*, 691 F.2d 837, 839-40 (7th Cir.1982). Any consent to be sued or waiver of immunity will not be implied but must be unequivocally expressed and strictly construed. *Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S.Ct. 2698, 2701, 69 L.Ed.2d 548 (1981); *Ogden*, 758 F.2d at 1177. Such consent cannot be inferred from an ambiguous statute, and any ambiguity must be resolved against consent. *See United States v. King*, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969); *United States v. Shaw*, 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888 (1940); *Garcia v. United States*, 776 F.2d 116, 118 (5th Cir.1985).

A person who sues the United States has the burden of pointing to a congressional act which gives the consent to be sued. *Cole v. United States*, 657 F.2d 107, 109 (7th Cir.), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 639, 70 L.Ed.2d 618 (1981). American has designated the FTCA as the act which allows the United States to be sued in this case. The court must determine whether the FTCA permits suits against the United States when the FDIC's actions as a receiver for a failed bank form the basis for the action.

Under the FTCA, if a plaintiff brings a tort claim against a federal agency, he must sue the United States. 28 U.S.C. § 2679(a). The issue here is whether the FDIC, acting as a receiver, is an agency for purposes of the FTCA. The FTCA provides:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States. . . .

28 U.S.C. § 2671. In this case, the FDIC must have been acting *primarily* as an agency of the United States government in order for American to be able to sue the United States under the FTCA for the FDIC's acts.

The FDIC is authorized by statute to act in two separate and distinct capacities: as a corporate entity and as a receiver. *See* 12 U.S.C §§ 1811, 1821(c), 1822, 1823(e). The courts have consistently recognized this dual capacity, treating the FDIC acting within these two roles as distinct entities. *See e.g. FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1109 (1st Cir.1986); *FDIC v. LaRambla Shopping Center*, 791 F.2d 215, 218-19 (1st Cir.1986); *FDIC v. Hatmaker*, 756 F.2d 34, 36 n. 2 (6th Cir.1985); *In re F & T Contractors, Inc.*, 718 F.2d 171, 176 (6th Cir.1983); *Gunter v. Hutcheson*, 674 F.2d 862, 873-74 (11th Cir.), *cert. denied*, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982); *Gilman v. FDIC*, 660 F.2d 688 (6th Cir.1981); *FDIC v. Godshall*, 558 F.2d 220 (4th Cir.1977); *Freeling v. Sebring*, 296 F.2d 244 (10th Cir.1961). American, recognizing the separateness of the two entities, rather than filing a counterclaim against the plaintiff Corporate-FDIC, has instead filed a third-party complaint against the Receiver-FDIC, in the name of the United States. Having found the Receiver-FDIC to be a distinct entity, the court must focus on whether the FDIC acting in that capacity is an agency of the United States.

In *FDIC v. C.H. Butcher*, 660 F.Supp. 1274 (E.D.Tenn. 1987), the court discussed the two statutorily mandated functions as they relate to the overall purpose of the FDIC.

> The purpose of the FDIC is to promote stability and confidence in the nation's banking systems. *Gunter v. Hutcheson*, 674 F.2d 862 (11th Cir.), *cert. denied*, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63, *reh. denied*, 459 U.S. 1059, 103 S.Ct. 477, 74 L.Ed.2d 624 (1982); *First State Bank of Hudson County v. United States*, 599 F.2d 558 (3d Cir.1979). This purpose is achieved in two ways, first by providing insurance for payment to depositors of banks (sic) in case of

> failure and second by providing a method of handling failed banks. In the first instance, the FDIC in its corporate capacity acts as insurer of the deposits of the bank. In the second instance, the FDIC acts in a separate capacity as receiver of the insolvent bank.

660 F.Supp. at 1279. Statutorily, however, the primary function of the FDIC is to promote banking stability by insuring deposits of banks. 12 U.S.C. § 1811; *First State Bank of Hudson County v. United States*, 599 F.2d 558, 562 (3d Cir.1979), *cert. denied*, 444 U.S. 1013, 100 S.Ct. 662, 62 L.Ed.2d 642 (1980). Nonetheless, the relevant inquiry under the FTCA is not what the primary function of the FDIC is, but whether it was *acting primarily* as an agency of the United States.

The court has found no case which has directly held that the Receiver-FDIC is an agency of the United States, and thus the United States may be sued for the tortious acts of the FDIC acting in that capacity. Caselaw exists in other jurisdictions, however, with language which implicitly supports the United States' argument that the Receiver-FDIC is not an agency of the United States.

In *FDIC v. Smith*, 466 F.Supp. 843 (N.D.Ga.1979), the district court addressed the distinction between the dual roles of the FDIC:

> As a receiver of the insolvent bank, the FDIC *becomes a representative of that bank* and is required to marshall the assets of that bank for its shareholders and creditors. In its corporate capacity, the FDIC functions separately as a federal insurer of bank deposits, each capacity designed to secure a different purpose and each is governed by an express statute.

Id. at 845 (emphasis added), *quoting FDIC v. Abraham*, 439 F.Supp. 1150, 1151 (E.D.La. 1977). Utilizing these principles, the court dismissed counterclaims against the Corporate-FDIC for claims which should have been asserted against the FDIC acting as a receiver.

In *Sarraga v. Girod Vela & Co*, 649 F.Supp. 11 (D.P.R.1986), the court dismissed a claim against the FDIC acting in its corporate capacity as barred by the FTCA and remanded to state court a claim against the Receiver-FDIC. Concerning the latter claim, the court noted that 12 U.S.C. § 1819 Fourth recognizes an exception to federal jurisdiction in cases where the FDIC is a party. It provides that when the FDIC is acting as a receiver for a failed *state* bank, an action involving "only the rights or obligations of depositors, creditors . . .", those state law claims are not subject to federal question jurisdiction in the federal courts. 12 U.S.C. § 1819 Fourth. The present case involves the FDIC acting as the receiver of Penn Square Bank, a national bank. While the provisions of 12 U.S.C. § 1819 Fourth do not apply and the holding of *Sarraga* does not directly pertain to the present facts, the *Sarraga* court failed to imply a remedy under the FTCA against the Receiver-FDIC, but remanded the state claim against the receiver to state court and found the claim against the Corporate-FDIC was barred by the FTCA's provisions.

In *FDIC v. Glickman*, 450 F.2d 416 (9th Cir.1971), the Ninth Circuit held that the United States and the FDIC acting as a receiver of an insolvent national bank were not the same "person" under a California statute involving an exception to the hearsay rule. The court noted:

> At this point, however, a distinction must be drawn between FDIC's dual capacity as federal insurer of deposits and as liquidating agent for the bank . . . In the latter instance *FDIC stands in the shoes of the insolvent bank*. . . . The Government, not the insolvent bank, proffered the excluded testimony in the former criminal action. The distinction is further heightened by the fact that FDIC, in its capacity as receiver of a bank, is not represented by the United States Attorney, as would be the Government if it were a party. Under the circumstances of this case we hold that the United States Government and the FDIC are not the same person for purposes of making applicable the hearsay exception.

Id. at 418 (emphasis added). While *Glickman* did not concern an action under the FTCA, its language clearly implies that the FDIC acting as a receiver should not be considered an agency of the United States government.

Finally, in *Sharp v. FDIC*, No. 75-1428, slip op. (D.C. Cir.1976), in an unpublished opinion the District of Columbia Circuit held that Sharp could not obtain documents from the FDIC pursuant to the Freedom of Information Act. The court indicated that the FDIC acting under state law as a receiver of a state bank was not holding the documents as a federal agency within the meaning of the Freedom of Information Act. Slip op. at 3. Again, the *Sharp* decision is not factually on point, but has language indicating that the FDIC as a receiver is not a federal agency.

While these cases lend support to the United States' argument that the Receiver-FDIC is not an agency of the United States government, the court must address the relevant caselaw existing in this circuit. The Seventh Circuit's leading case relevant to the matters before the court is *FDIC v. Citizens Bank & Trust Co.*, 592 F.2d 364 (7th Cir.), *cert. denied*, 444 U.S. 829, 100 S.Ct. 56, 62 L.Ed.2d 37 (1979). In *Citizens*, the FDIC in its corporate capacity brought suit against an insolvent state bank, Citizens Bank & Trust Company of Park Ridge, Illinois ("Citizens"), to collect money owed to the bank. Citizens asserted a setoff and counterclaim against the FDIC acting as the receiver for the bank. The basis for that claim was the Receiver-FDIC's transfer to the Corporate-FDIC of the proceeds of another bank's loan in which Citizens participated. The Seventh Circuit held that a claim against the FDIC sounding in tort (which was the case there) must be brought under the FTCA. *Id.* at 371. The court noted that the "FDIC is unquestionably a 'federal agency' within the meaning of § 2679(a) [of the FTCA]." *Id.* at 369 n. 5. However, under the specific provisions of the FTCA, the FDIC was immune under the facts of that case. *Id.* at 373. While the *Citizens* court never addressed the distinction between the two roles of the FDIC in re-

gard to suability under the FTCA, the counterclaim was against the FDIC acting as a receiver. Thus, *Citizens* implicitly stands for the proposition that any suit against the FDIC, regardless of the capacity under which the FDIC was acting, must be brought under the FTCA because the FDIC is an agency of the United States government. *See also Safeway Portland Employees' Federal Credit Union v. FDIC*, 506 F.2d 1213, 1215 (9th Cir.1974) ("[t]he FDIC is clearly a federal agency and within the coverage of the FTCA"); *FDIC v. TWT Exploration Co.*, 626 F.Supp. 149, 151 (W.D.Okla.1985) (in dicta the court noted that a suit sounding in tort against the FDIC acting as a receiver, must be brought, if at all, "directly against the United States in conformity with the requirements of the FTCA").

In sum, the court has not found any case explicitly holding that the FDIC when acting as a receiver is primarily acting as an agency of the United States, and thus any suit against the Receiver-FDIC must come under the FTCA. Conflicting authority exists as to whether the Receiver-FDIC is an agency for purposes of the FTCA. However, the *Citizens* decision lends strong support that it is. Moreover, the court notes that although two distinct FDIC entities were statutorily created by Congress, Congress never provided that the FDIC acting as a receiver would somehow fall outside the purview of the FTCA (would not be acting "primarily as an agency . . .") when the FDIC was fulfilling one of its statutorily mandated duties. Further, the FDIC, an agency of the United States created by Congess, when acting as a receiver has rights superior to those of other receivers. *See* 12 U.S.C. §§ 1821(d), 1822, 1823(e). Thus, the FDIC does more than "stand in the shoes" of the failed bank. For all these reasons, the court holds that American has properly sued the United States under the FTCA for the tortious acts of one of its agencies, the FDIC, acting as the receiver of Penn Square Bank.

The United States also argues in its reply brief that proper venue for the third-party complaint is in Oklahoma,

the location of the Penn Square Bank. Although American has refused in its surreply and during oral argument to respond to this additional ground for dismissal, Federal Rule of Civil Procedure 12(b)(3), the court will address its merits.

The relevant venue statute for actions against the FDIC acting as receiver of a national banking association provides:

> Any action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed Receiver, or against the Federal Deposit Insurance Corporation as Receiver of such association, shall be brought in the district or territorial court of the United States held within the district in which that association's principle place of business is located. . . .

12 U.S.C. § 94. The courts have strictly construed this provision, finding it both mandatory and exclusive. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 152, 96 S.Ct. 1989, 1992, 48 L.Ed.2d 540 (1976); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Continental Illinois Corp.*, 640 F.Supp. 182, 183 (N.D.Ill.1986). In *Radzanower*, a national banking association was sued in federal court for allegedly violating the Securities Exchange Act of 1934. A conflict existed between the venue provision under the Securities Exchange Act and the narrower venue provision of the National Bank Act, 12 U.S.C. § 94 (the predecessor of the present statute which the court in *Nat'l Union* fund to be more ambiguous than the present provision). The Supreme Court rejected the argument that when a suit is brought under the Securities Exchange Act it loses the protection of § 94. The Court noted that the more general Securities Exchange venue provision was enacted after the narrow provisions of the National Bank Act. The Court also examined the legislative history of the Securities Exchange Act and the purposes served by each respective venue provision and concluded that the narrowly drawn § 94 controlled over the more general

Securities Exchange venue provision. *Radzanower*, 426 U.S. at 158, 96 S.Ct. at 1995.

The court finds the principles of *Radzanower* regarding statutory construction apply here. When the United States is a defendant to a suit in tort under § 1346 of the FTCA, venue is proper where the plaintiff resides or where the act or omission complained of occurred. 28 U.S.C. § 1402(b). The narrow venue provision under § 94 controls over the more general FTCA provision. Addressing the specific facts of this case, even though the United States is the named entity sued, the action is against the FDIC for its acts as a receiver for a failed national banking association, the Penn Square Bank. Penn Square Bank had its principal place of business in Oklahoma City, Oklahoma. Thus, venue is proper for the third-party complaint in that forum.

Authority exists, however, which supports the conclusion that if a court has jurisdiction and venue over the original complaint, and the third-party complaint is subject to dismissal or transfer under § 94, the court will not allow the third-party complaint to be dismissed or transferred. *See Petrizzo v. United States*, 492 F.Supp. 752 (D.N.J.1980); *Jones v. Kreminski*, 404 F.Supp. 667 (D.Conn.1975), *appeal dismissed*, 603 F.2d 213 (2d Cir. 1979), *remanded*, 614 F.2d 1287 (2d Cir.1979); *Odette v. Shearson, Hammill & Co.*, 394 F.Supp. 946 (S.D.N.Y. 1975); *Flagship Nat'l Bank of Miami v. Commercial Bank & Trust Co.*, 428 So.2d 361, 362 (Fla.Dist.Ct.App. 1983); 3 J. Moore, *Moore's Federal Practice* ¶ 14.28[2] (2d ed. 1987); *contra Swiss Israel Trade Bank v. Mobley*, 319 F.Supp. 374 (S.D.Ga.1970); *Lazarow Rettig & Sundel v. Castle Capital Corp.*, 49 N.Y.2d 508, 427 N.Y.S.2d 404, 404 N.E.2d 130 (1980). Here, the third-party claim is directly related to the underlying claim and much of the discovery would be duplicative if the third-party complaint were litigated in a separate forum. Moreover, separate litigation would cause serious inconvenience to American; it would be forced to maintain legal counsel and litigate in two locations. Finally, judicial resources would be con-

served by the centralization of this apparently complex litigation.

In conclusion, the United States' motion to dismiss the third-party complaint for lack of jurisdiction and for failure to state a claim is denied. Similarly, the United States' motion to dismiss or transfer the third-party complaint for lack of proper venue is denied. The court finds that this order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

IT IS SO ORDERED.

EXHIBIT B

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff,

v.

HARTFORD INSURANCE COMPANY OF ILLINOIS, et al., Defendants.

The AMERICAN INSURANCE COMPANY, Third-Party Plaintiff-Appellee,

v.

UNITED STATES of America, Third-Party Defendant-Appellant.

No. 88-3268.

United States Court of Appeals, Seventh Circuit.

Argued April 7, 1989.

Decided June 15, 1989.

Rehearing and Rehearing En Banc Denied July 25, 1989.

* * * * *

Before POSNER, EASTERBROOK and RIPPLE, Circuit Judges.

EASTERBROOK, Circuit Judge.

When the Federal Deposit Insurance Corporation bailed out Continental Illinois National Bank in 1984, it acquired, in addition to a lot of bad loans, Continental's right to collect on fidelity bonds issued by five insurance companies. These insurers promised to compensate Continental for losses caused by its employees' misconduct. Hanky-panky in dealing the Penn Square Bank of Oklahoma has

landed John R. Lytle, the head of the Mid-Continent Division of Continental's Oil and Gas Group, in prison. The FDIC wants recompense for the losses Lytle left behind.

Lytle—inspired by $585,000 in unsecured personal "loans" from Penn Square arranged by its officer William G. Patterson—induced Continental to purchase participations worth more than $1 billion in loans made by Penn Square. Continental was left holding the bag when many of the borrowers folded, taking Penn Square with them. See *United States v. Lytle*, 677 F.Supp. 1370 (N.D.Ill.1988), describing the criminal case. (Lytle and Patterson pleaded guilty in June 1988.) Continental's losses exceed $200 million, the exact amount depending on how much can be recovered from the assets backing the loans.

The FDIC filed this suit to collect on the fidelity bonds, which cover tiers of losses. Hartford Insurance Company, for example, supplied $5 million of coverage with a $1 million deductible; Insurance Company of North America supplied $5 million of coverage with a $6 million deductible (i.e., the band between $6 million and $11 million), and so on up to $101 million. American Insurance Company underwrote the bands between $11-31 million and $71-101 million (a total exposure of $50 million). The FDIC asked not only for this $50 million but also for punitive damages on the ground that American financed Lytle's defense against the criminal charges, violating its fiduciary duty to Continental.

American responded with a third-party complaint against the United States under Fed.R.Civ.P. 14(a). It believes that the FDIC, as receiver, mismanaged Penn Square's portfolio of loans and thus magnified Continental's losses. American believes that it should not be required to pay the FDIC, as insurer of Continental's deposits (FDIC-Corporate), more than the loss Continental would have borne had the FDIC, as receiver (FDIC-Receiver), maximized the value of the assets securing the loans. FDIC-Receiver's errors, according to American, are torts for which it has a remedy under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80.

Resort to the FTCA introduces a complication: the right defendant is the United States. Suits by and against the FDIC are authorized by 12 U.S.C. § 1819 Fourth, a sue-and-be-sued clause. If American were to sue FDIC-Receiver, it would have to go to Oklahoma in light of 12 U.S.C. § 94, which provides:

> Any action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed receiver, or against the Federal Deposit Insurance Corporation as receiver of such association, shall be brought in the district or territorial court of the United States held within the district in which that association's principal place of business is located. . . .

The United States asked the district court to dismiss it as a party and to direct American to proceed under § 1819 Fourth against FDIC-Receiver. Although the initial motion did not mention venue, the United States supplemented its contentions before the district court took up the matter and so avoided forfeiting the venue point under Fed.R.Civ.P. 12(h)(1). *Bechtel v. Liberty National Bank*, 534 F.2d 1335, 1341 (9th Cir.1976). The district court denied the motion, 692 F.Supp. 866 (N.D.Ill.1988), and certified issues for an interlocutory appeal under 28 U.S.C. § 1292(b). We accepted jurisdiction.

Despite sue-and-be-sued clauses, the FTCA is the exclusive remedy when it applies, 28 U.S.C. § 2679(a). We held in *FDIC v. Citizens Bank & Trust Co.*, 592 F.2d 364 (7th Cir.1979), that § 2679(a) precludes suits under the sue-and-be-sued clauses even when one of the exemptions in the FTCA prevents the imposition of liability on the United States. Although there is a question whether a suit against the FDIC *as receiver* is a suit against an "agency" of the United States—important because § 2679(a) makes the FTCA exclusive only when a "federal agency" is involved—the district court thought the matter settled by *Citizens Bank*. The tort alleged in *Citizens Bank* had been committed by the FDIC as receiver, and

in remarking, 592 F.2d at 369 n. 5, that "FDIC is unquestionably a 'federal agency' within the meaning of §2679(a)" we made nothing of the distinction between FDIC as corporation and FDIC as receiver. So the district court held that the United States is the proper defendant, 692 F.Supp. at 867-70. If the suit is against the United States rather than FDIC-Receiver, 12 U.S.C. § 94 seems inapplicable. Nonetheless, the district court believed, "[t]he narrow venue provision under § 94 controls over the more general FTCA [venue] provision". 692 F.Supp. at 871. But just as it seemed about to pack American's action off to Oklahoma City, the district court distinguished third-party from original actions. Believing that it would be convenient to litigate everything in Illinois, the court denied the motion to transfer. *Ibid.*

Logically, our first question is: "Who is the right defendant?" If FDIC-Receiver is the proper party, then § 94 applies by its terms. In authorizing the appeal, however, the Solicitor General instructed counsel not to argue that FDIC-Receiver is the proper party. Apparently the Solicitor General believed that question foreclosed in this circuit by the implication (though not the square holding) of *Citizens Bank*. At oral argument counsel for the United States steadfastly declined to address the subject. Yet if the identity of the proper party affects subject-matter jurisdiction, we must wrestle with the problem no matter what the parties do. Even if not jurisdictional, an unresolved dispute about the right party may make it improvident to take up the interpretation of § 94 on interlocutory appeal.

Whether the United States or FDIC-Receiver is the right party does not affect subject-matter jurisdiction, however. If the United States is the right party, then 28 U.S.C. § 1346(b) supplies jurisdiction. If FDIC-Receiver is the right party, then judicial competence comes from § 1819 Fourth and 28 U.S.C. § 1331. Section 1819 Fourth provides that any civil suit to which the FDIC is a party is deemed to arise under federal law (so that § 1331 supplies jurisdiction) unless the FDIC acts as receiver of

a state bank and the suit "involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law". See also *FDIC v. Elefant*, 790 F.2d 661, 665-66 (7th Cir.1986). A tort claim against the FDIC is not one that involves "only" creditors or stockholders' rights. *DuVoison v. FDIC*, 872 F.2d 1257 (6th Cir.1989). To the extent sovereign immunity has jurisdictional attributes, there are no worries: either the FTCA or § 1819 Fourth waives immunity. So the claim may be resolved by a federal court, and the identification of the real party in interest, Fed.R.Civ.P. 17(a), is not a jurisdictional problem.

Sooner or later this court must decide whether, given *Citizens Bank*, the venue provisions of § 94 have melted away. This case is as good as any, and we therefore decline to reconsider the decision of another panel of this court accepting the appeal under § 1292(b). We would be concerned if we thought that the Department of Justice were trying to maneuver this case to Oklahoma City only to ask the Tenth Circuit to disagree with *Citizens Bank*, consigning American's claim to limbo. At oral argument counsel for the United States disavowed any such plan, and the law of the case would make the tactic difficult even if the United States were inclined to try. *Christianson v. Colt Industries Operating Corp.*, ___ U.S. ___, 108 S.Ct. 2166, 2179, 100 L.Ed.2d 811 (1988).

So we turn to the question whether 12 U.S.C. § 94, which controls venue in suits "against the Federal Deposit Insurance Corporation as receiver of [a defunct banking] association", applies when the United States is the party. Although not 100% word play, this question is highly formal. What is "the Federal Deposit Insurance Corporation as receiver" other than part of the United States? To sue FDIC-Receiver is to sue those officials of the federal government who happen to be responsible for winding up the affairs of failed banks. Sometimes a suit arising out of a federal activity will bear the name of the persons responsible in the "official capacity" (think of the flood of cases styled Applicant for Benefits. v. Today's

Secretary of Health and Human Services), sometimes it will name the agency (Employer v. National Labor Relations Board), sometimes the United States. Whether these differences in nomenclature make a difference to venue depends on the function of the statute. *Stafford v. Briggs*, 444 U.S. 527, 100 S.Ct. 774, 63 L.Ed.2d 1 (1980).

Section 94 is the residue of the venue provision of the National Bank Act of 1864, which applied to all suits against national banks. See *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 96 S.Ct. 1989, 48 L.Ed.2d 540 (1976). It was designed "to prevent interruption in the [bank's] business that might result from their books being sent to distant counties", *First National Bank of Charlotte v. Morgan*, 132 U.S. 141, 145, 10 S.Ct. 37, 38-39, 33 L.Ed. 282 (1889). Photocopiers, computers, fax machines, and air travel removed the rationale for the statute. Instead of repealing § 94, however, Congress curtailed its scope in 1982, substituting receiverships for banks. Section 95 now centralizes the winding-up of banks much as the Bankruptcy Code draws into a single forum the winding-up of other firms. One court will oversee the receivership, conserving both judicial resources and the assets of the estate, which could dwindle as FDIC-Receiver retained law firms across the country to educate many district judges about the status of a single bank.

One failure can spawn dozens of cases, a point Penn Square proves. Section 94 has been used repeatedly to consolidate the fallout of that collapse. E.g., *National Union Fire Insurance Co. v. Continental Illinois Corp.*, 640 F.Supp. 182 (N.D.Ill.1986); *In re Continental Securities Litigation*, No. 82 C 4712 (N.D.Ill. Oct. 21, 1985); *In re Longhorn Securities Litigation*, 573 F.Supp. 274 (W.D. Okla.1983). Section 94 was amended shortly after Penn Square closed in July 1982, and Rep. Lott remarked: "Why is this legislation badly needed? That can be summed up in three words—Penn Square Bank." 128 Cong. Rec. 27346 (Oct. 1, 1982). One district judge in Oklahoma has become (all too) familiar with the affairs of Penn Square and FDIC-Receiver's management of the estate. Chal-

lenges to FDIC-Receiver's conduct belong there to facilitate quick, consistent decision-making. If the funds to pay a judgment order under the FTCA would come from the Penn Square estate, or even from the FDIC's budget, this becomes even clearer. (The FTCA designates the Treasury's Judgment Fund as the source of compensation only when "payment is not otherwise provided for". 31 U.S.C. § 1304(a)(1). The FDIC's statute calls for payment of receivership expenses out of the receivership estate. 12 U.S.C. §§ 197, 1822(a). We need not decide whether this puts receivership assets, or the FDIC's insurance fund, at risk when FDIC-Receiver is charged with mismanagement.)

Treating FDIC-Receiver and the United States as separate parties for purposes of § 94 threatens more than the central administration of the failed bank's estate. Almost anything the FDIC does as receiver could in principle be characterized as a tort, making the United States the right defendant. The rest of what FDIC-Receiver does probably comes under the head of contract, and the United States may be the right party in contract actions too, given the Tucker Act, 28 U.S.C. § 1346(a)(2). If suits about the conduct of FDIC-Receiver but naming the "United States" fall outside § 94 for that reason, not much would be left of § 94. Courts should think twice before giving a statute a reading that renders it inapplicable to the kinds of cases for which it was designed. *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 560, 83 S.Ct. 520, 523, 9 L.Ed.2d 523 (1963) (applying this principle to § 94); *Elefant*, 790 F.2d at 666. American wants us to give § 94 a reading that would leave its 1982 version stillborn. The district court declined; so do we.

Last comes the question whether third-party actions should be treated differently from original actions. This district court said "yes", explaining:

> [T]he third-party claim is directly related to the underlying claim and much of the discovery would be duplicative if the third-party complaint were litigated

> in a separate forum. Moreover, separate litigation would cause serious inconvenience to American; it would be forced to maintain legal counsel and litigate in two locations. Finally, judicial resources would be conserved by the centralization of this apparently complex litigation.

692 F.Supp. at 871. This does not persuade us on either factual or legal planes. Duplicative discovery is unnecessary. Once either side gets its hands on a fact, it is unnecessary to "discover" the datum again in a second forum. Judicial resources will be conserved by separation rather than joinder of the claims. The district court in Oklahoma is well-versed in the Penn Square receivership, while the district court in Illinois would have to immerse itself in a complex proceeding unfamiliar to it before it could decide whether FDIC-Receiver tortiously mismanaged the Penn Square estate. Whether Lytle violated his duties to Continental—the central issue in litigation to collect on the fidelity bonds—is unrelated to whether FDIC-Receiver violated its duties to Penn Square's creditors. Problems in the administration of the estate relate only to damages in the Illinois action, and then only if exemplary performance by the FDIC would have reduced Continental's losses to less than $101 million.

Be that as it may, the legal point is dispositive. The district judge examined convenience from the perspective of American, the third-party plaintiff. Section 94, like venue rules generally, *Leroy v. Great Western United Corp.*, 443 U.S. 173, 184-85 & n. 16, 99 S.Ct. 2710, 2716-2717 & n. 16, 61 L.Ed.2d 464 (1979), is designed to protect the defendant's convenience, not the plaintiff's. Perhaps we should say that § 94 *especially* was designed to protect defendants' convenience. *Charlotte National Bank*, 132 U.S. at 145, 10 S.Ct. at 38-39. The former version was a uniquely powerful statute, trumping other venue provisions of more general application. E.g., *Radzanower* (§ 94 prevails over the nationwide venue provision of the securities laws). Nothing in the 1982 amendment, which

cut the scope from all banks to failed banks, suggests that § 94 is to have less force when it applies. *Langdeau*, 371 U.S. at 563-64, 83 S.Ct. at 524-25 brushed aside a contention that § 94, if appied, would compel the plaintiff to sue in multiple forums. So, here, the prospect that American will have to visit two forums cannot detain us. FDIC-Receiver is entitled to the privilege given by § 94 despite the cost to its adversary. If statutes such as the one considered in *Radzanower* yield to § 94, then the common law doctrine of "ancillary venue" in third-party actions yields too.

The decision of the district court is vacated, and the case is remanded with instructions to transfer American's FTCA claims to the Western District of Oklahoma under 28 U.S.C. § 1406(a).

RIPPLE, Circuit Judge.

As the majority points out, the United States has declined to argue whether the FDIC-Receiver, rather than the United States, is the proper defendant in the third-party action. I would therefore vacate the grant of permission to bring this discretionary appeal on the ground that permission was improvidently granted.

EXHIBIT C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 25, 1989.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

FEDERAL DEPOSIT INSURANCE CORP.

Plaintiff

No. 88-3268 v.

HARTFORD INSURANCE CO. OF ILLINOIS ET AL.

Defendants

THE AMERICAN INSURANCE CO.

Third-Party Plaintiff-Appellee

v.

UNITED STATES OF AMERICA

Third-Party Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 8682—**Charles R. Norgle,** *Judge.*

ORDER

Third-Party Plaintiff-Appellee filed a petition for rehearing and suggestion of rehearing en banc on June 29, 1989. No judge in regular active service has requested a vote on the suggestion for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.